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BRIEFS

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No. 16-529

IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under 28 U.S.C. § 2462, any "action, suit or proceeding for enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

The Question Presented is:

Does the five-year statute of limitations in 28 U.S.C. § 2462 apply to claims for "disgorgement"?

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INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has regularly appeared before this Court and other federal courts in numerous cases related to the proper scope of the federal securities laws. *See, e.g., Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014). In particular, WLF has participated in litigation regarding the applicability of 28 U.S.C. § 2462's five-year limitations period to enforcement actions filed by the Securities and Exchange Commission (SEC). *See, e.g., Timbervest LLC v. SEC*, Case No. 15-1416 (dec. pending, D.C. Circuit).

WLF is concerned by SEC's willingness to pursue enforcement actions many years after the events giving rise to those actions occurred. Congress has established a five-year limitations period for the enforcement of any civil fine, penalty, or forfeiture by SEC and other federal agencies. Nonetheless, SEC over the past several decades has raised a series of arguments regarding why that statute of limitations

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing; letters of consent have been lodged with the Court.

imposes virtually no constraints on its enforcement authority. WLF fears that if the Court accepts SEC's arguments in this case, the five-year statute of limitations will be rendered a nullity.

WLF agrees with Petitioner that the disgorgement order SEC issued in this case is both a "penalty" and a "forfeiture," within the meaning of 28 U.S.C. § 2462. This brief focuses on the "penalty" issue.

STATEMENT OF THE CASE

The disgorgement order at issue in this case arose in connection with an SEC enforcement action filed against Petitioner Charles Kokesh in 2009. The SEC charged that Kokesh, between 1991 and 2007, misappropriated funds from four SEC-registered business development companies in violation of federal securities laws. Following a jury verdict in SEC's favor, the district court entered judgment against Kokesh in March 2015. Pet. App. 20a-47a. The final judgment: (1) permanently enjoined Kokesh from violating certain provisions of the securities laws; (2) imposed a civil fine of $2.4 million; (3) ordered Kokesh to disgorge $34.9 million (which the court said "reasonably approximates the ill-gotten gains causally connected to Defendant's violations"); and (4) ordered Kokesh to pay $18.1 million in prejudgment interest. *Id.* at 46a.

The district judge held that § 2462—the five-year limitations period—applied to SEC's imposition of a civil fine, and he thus based his fine calculation solely on Kokesh's activities during the five years

immediately prior to SEC's 2009 filing. *Id.* at 25a-32a. He held, however, that § 2462 was inapplicable to the SEC's request for disgorgement of ill-gotten gains because, he concluded, disgorgement is not a "penalty" within the meaning of § 2462. *Id.* at 41a-44a. He stated that a $34.9 million disgorgement order was appropriate because it "reasonably approximate[d]" the amount of funds that Kokesh misappropriated between 1991 and 2007, although he noted that many of the funds in question were not transferred to Kokesh or related entities. *Id.* at 43a-45a. The judge deemed it proper to base disgorgement on the total amount of misappropriated funds—not simply Kokesh's net profit from his activities—because doing so would "deter others' violations of the securities laws." *Id.* at 43a.

The Tenth Circuit affirmed. Pet. App. 1a-19a. It held that disgorgement was neither a "penalty" nor a "forfeiture" within the meaning of § 2462 and thus that the five-year limitations period did not bar a disgorgement order for pre-2004 activities. *Id.* at 10a-16a. It stated that "disgorgement is not a penalty under § 2462 because it is remedial" and "does not inflict punishment." *Id.* at 10a-11a. The Court stated, "To be sure, disgorgement serves a deterrent purpose, but it does so only by depriving the wrongdoer of the benefits of wrongdoing." *Id.* at 11a. It categorized disgorgement as "equitable relief" and noted that federal law authorizes courts to grant equitable relief sought by SEC. *Id.* at 10a (citing 15 U.S.C. § 78u(d)(5)).

The appeals court concluded that the disgorgement order was not rendered "punitive" simply because Kokesh was "being required to disgorge more

than he actually gained himself." *Id.* at 12a. It explained, "[T]here is nothing punitive about requiring a wrongdoer to pay all the funds he caused to be improperly diverted to others as well as to himself." *Ibid.*

The appeals court stated that its decision was informed by a presumption that statutes of limitation are to be strictly construed when applied against the federal government:

> Statutes of limitations are interpreted narrowly in the government's favor to protect the public from the negligence of public officers in failing to timely file claims in favor of the public's interest. ... And we have recognized that equitable claims are usually not subject to statutes of limitations.

Id. at 6a (citation omitted).

SUMMARY OF ARGUMENT

The SEC conceded that it filed its enforcement action against Kokesh more than five years after most of the events giving rise to the proceedings. A federal statute bars any SEC "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture," unless it is commenced within five years of the date on which its claims "first accrued." 28 U.S.C. § 2462. Those claims accrued at the time the alleged misconduct occurred. *Gabelli v. SEC*, 133 S. Ct. 1216, 1220-21 (2013). Because the disgorgement ordered by the district court is properly classified as a "penalty,"

§ 2462 bars disgorgement of any funds allegedly misappropriated more than five years before October 27, 2009 (the date on which SEC filed suit).

More than a century ago, the Court provided guidance regarding when a civil sanction should be deemed a penalty or forfeiture for purposes of § 2462's predecessor:

> The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such.

Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 423 (1915). It is uncontested that no portion of the disgorgement order sought by SEC and granted by the district court was imposed "for the purpose of redressing a private injury." Accordingly, that sanction qualifies as a "penalty" within the meaning of § 2462.

The Court recently reiterated the broad scope of § 2462 in *Gabelli*, which rejected SEC's efforts to apply a "discovery rule" to § 2462, such that an SEC claim would not accrue until the Commission "discovers" its cause of action. The Court ruled instead that an SEC claim "accrues when it comes into existence." *Id.* at 1220. It explained that its reading of "accrued" advances the "basic policies" of all statutes of limitations by setting a "fixed date" after which the threat of SEC enforcement ends, and thereby provides

defendants with repose and certainty about their potential liability. *Ibid.*

In disputing Kokesh's § 2462 defense, SEC argues that its disgorgement remedy is "equitable," not "punitive," in nature. That argument lacks merit. What SEC terms "disgorgement"—a remedy that SEC only recently began requesting in enforcement actions and that is not designed to provide restitution to anyone injured by Kokesh's conduct—has never been categorized as an equitable remedy by this Court. The historical antecedents to which SEC points involve efforts by equity courts to provide restitution to individuals identified as having been injured by the defendants' activities.

The disgorgement order imposed on Kokesh can only be viewed as an effort to punish him. The Tenth Circuit concluded that the order did not impose a penalty because "[d]isgorgement just leaves the wrongdoer in the position he would have occupied had there been no misconduct." Pet. App. 11a. But under what circumstances would the government ever seek to disgorge funds from a private individual and keep them for itself? The appeals court's own words provide the ready answer: when the government determines that the individual deserves to be sanctioned because he is a "wrongdoer" who has engaged in "misconduct." Imposing a civil judgment because an individual has engaged in "misconduct" and because the government seeks to prevent him from profiting by his misconduct fits comfortably within any commonly understood definition of "penalty." The appeals court's recognition that "disgorgement serves a deterrent purpose," *ibid*, only strengthens that conclusion; deterrence of future

wrongdoing is one of the principal reasons why governments impose penalties.

Moreover, adopting SEC's argument would eviscerate § 2462. The statute of limitations would cease to exist if SEC could avoid the limitations of § 2462 any time it articulated an "equitable" rationale for imposing sanctions, and (as this case well illustrates) SEC has little difficulty concocting such rationales. Indeed, now that *Gabelli* has taken a major weapon out of SEC's arsenal—by preventing use of a discovery rule to extend the § 2462 limitations period—SEC seeks disgorgement in virtually *all* of its enforcement actions.

Finally, the Court should construe § 2462 without placing a thumb on SEC's side of the scale, as the Tenth Circuit did. This Court has never cited the narrow-construction-of-statutes-of-limitations maxim in cases in which, as in *Gabelli*, it addressed a statute-of-limitations issue in the context of a government enforcement action. Indeed, *Gabelli* cited another maxim, older still, a maxim specifically relating to actions for penalties and that points in the opposite direction: "'It would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.)).

ARGUMENT

I. DISGORGEMENT IS A SECTION 2462 "PENALTY" BECAUSE ITS MONETARY SANCTION IS NOT IMPOSED SOLELY, OR EVEN PARTIALLY, FOR THE PURPOSE OF REDRESSING PRIVATE INJURY

The SEC's enforcement action against Kokesh sought sanctions against him for alleged violations of, *inter alia*, § 37 of the Investment Company Act of 1940, 15 U.S.C. § 80a-36. The SEC alleged that he knowingly and willfully converted investment-company assets to his own use or to the use of another. Because the Act lacks a statute-specific limitations period, SEC proceedings under the Act are subject to the five-year statute of limitations imposed by 28 U.S.C. § 2462 on all proceedings "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."[2] *Gabelli*, 133 S. Ct. at 1219. Because the disgorgement sanction SEC seeks to impose against Kokesh qualifies as a "penalty," it is largely time-barred. Of the $34.9

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[2] The statute provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462. The statute's origins date back to at least 1839, and its wording has been unchanged since 1948. *See* Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 322.

million disgorgement sanction, only $4 million relates to activities that occurred within five years of SEC's 2009 filing.

Ordinarily, a word's usage in a statute "accords with its dictionary definition." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015). In common usage, a "penalty" is "the suffering in person, rights, or property which is annexed by law or judicial decision to the commission of a crime or public offense." *Webster's Third New International Dictionary* 1668 (1976). The disgorgement sanction imposed on Kokesh fits comfortably within that definition. The $34.9 million sanction (plus prejudgment interest) imposes "suffering" and "punishment" on Kokesh as a consequence of his alleged violations of the Investment Company Act of 1940.

In construing § 2462 and its predecessor statutes, the Court has sought to distinguish between sanctions designed to punish the defendant and sanctions whose principal purpose is to provide compensation for individuals injured by the defendant's conduct. The former are "penalties" subject to § 2462's five-year limitations period; the latter are not:

> The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such.

Meeker, 236 U.S. at 423.[3] It is undisputed that none of the disgorgement sanction imposed on Kokesh is designed to provide compensation to anyone who may have been injured by his alleged misconduct. Accordingly, the disgorgement qualifies as a "penalty" (as well as a "forfeiture") within the meaning of § 2462.

Meeker's definition of "penalty" aligns with the definition adopted by the Court in other contexts. For example, in a 19th-century decision that addressed when a judgment in a state court should be deemed "penal" for purposes of the Full Faith and Credit Clause, the Court explained that "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the state. ... The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Huntington v. Attrill*, 146 U.S. 657, 667-68 (1982). In further explanation, the Court stated that the question of whether a law is penal depends on whether its purpose "is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrong." *Id.* at 673-74.[4] The

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[3] *Meeker* held that sanctions imposed by the Interstate Commerce Commission against a railroad did not constitute a "penalty or forfeiture" within the meaning of the predecessor of § 2462—Rev. Stat. § 1047, Comp. Stat. 1913, § 1712—because the sanctions were designed to provide compensation to a company that the railroad had overcharged for shipping coal. *Id.* at 423.

[4] The Court concluded that the New York statute in question was not "penal" because it was designed to provide compensation to creditors of underfunded corporations, not to

Court relied on *Huntington* in construing the meaning of "penalty" as used in § 2462's predecessor. *See Meeker*, 236 U.S. at 423.

The D.C. Circuit has adopted that same definition of a § 2462 "penalty": "a sanction used to punish an individual for unlawful or proscribed conduct, going beyond compensation of the wronged party." *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) (citations omitted). Because SEC waited more than five years before initiating proceedings for the purpose of imposing a disgorgement sanction on Kokesh that went "beyond compensation of the wronged party," the sanction is time-barred to the extent that it relies on events pre-dating October 2004.

A. *Gabelli* Confirms the Broad Reach of Section 2462

The SEC has long chafed at what it views as § 2462's overly restrictive limitations period. But rather than approaching Congress to amend the statute, it has urged courts to adopt a variety of measures designed to lengthen the limitations period. In particular, over the past several decades it has urged courts to adopt a "discovery" rule, under which § 2462's limitations period would not accrue until SEC discovers, or with reasonable diligence should have discovered, the defendants' violations of the securities laws.

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punish an alleged wrongdoer. *Id.* at 676-77.

In *Gabelli*, the Supreme Court unanimously declined to adopt a discovery rule, holding instead that the § 2462 limitations period begins to run against SEC as soon as the defendant completes the actions alleged to have violated the securities law. 133 S. Ct. at 1216. In rejecting SEC's efforts to narrow the scope of § 2462, the Court repeatedly emphasized the broad reach of the statute of limitations. While the Court did not directly address § 2462's definition of a "penalty," language in the decision confirms *Meeker*'s holding that the "penalty" analysis should focus on whether SEC's sanctions go beyond remedying the damage caused to the harmed parties by the defendant's action.

For example, in rejecting SEC's request for adoption of a discovery rule, the Court explained, "We have never applied the discovery rule in this context where the plaintiff is not a defrauded victim seeking recompense." *Id.* at 1221. The Court distinguished statutes cited by SEC as examples of a discovery rule being applied to lawsuits filed by the government, noting that "in many of those instances, the Government is itself an injured victim looking for recompense, not a prosecutor seeking penalties." *Id.* at 1224. In other words, the Court was unwilling to relax the limitations imposed by § 2462 when the suit is one designed primarily to impose sanctions on the defendant, not to provide recompense for those injured by the defendant's conduct.[5]

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[5] The Court noted that "[t]he discovery rule helps to ensure that the injured receive recompense." *Id.* at 1223. But, the Court explained, "this case involves penalties, which go beyond compensation, are intended to punish, and label defendants

Gabelli also rejected a discovery rule because it determined that establishing a "fixed date" after which government enforcement efforts would be time-barred best served the purposes of statutes of limitations:

> This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."

Id. at 1221 (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)). The Court added that it has "deemed [statutes of limitations] vital to the welfare of society ... and concluded that even wrongdoers are entitled to assume that their sins may be forgotten." *Ibid* (citations omitted). That language is an implicit rejection of the SEC's approach in this case. By asserting that the overwhelming majority of its regularly employed sanctions is not subject to § 2462 without regard to whether those sanctions provide recompense to victims—and thus is not subject to *any* statute of limitations—SEC undercuts the purposes that, according to *Gabelli*, § 2462 serves.

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wrongdoers." *Ibid* (citing *Meeker*, 236 U.S. at 423).

B. The Manner in which SEC Imposes Its Disgorgement Remedy Has All the Hallmarks of a "Penalty"

That SEC's disgorgement remedy is a § 2462 "penalty" is further confirmed by the manner in which SEC has sought to apply it and the manner in which the Tenth Circuit and other federal appeals courts have enforced it.

In particular, SEC disclaims any interest in limiting disgorgement to the amount of profit that the defendant derived from his wrongdoing. Rather than simply attempting to disgorge funds for the purpose of placing Kokesh and other defendants in the same financial position they would have occupied but for their wrongdoing, SEC unabashedly claims the right to a monetary judgment that encompasses *all* funds misappropriated by wrongdoers—without regard to whether those funds represent profits and even without regard to whether the funds were ever received by the wrongdoer or affiliated entities.

The Tenth Circuit denied that such supra-profit sanctions constituted evidence that the disgorgement order in this case constituted a § 2462 "penalty." Pet. App. 12a-13a. The court asserted that imposing such sanctions is just: "it would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place." *Id.* at 12a (quoting *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114-15 (9th Cir. 2006)). But regardless whether

such sanctions are "just," one cannot plausibly argue that they are being imposed for the purpose of returning Kokesh to the financial position he would have occupied had no investor funds been misappropriated. Imposing supra-profit sanctions that place Kokesh in a far worse financial position, on the ground that justice requires that those guilty of fraud be treated in this manner, can only be described as subjecting him to a "penalty."

Moreover, SEC repeatedly asserts that normal evidentiary burdens should not apply to its efforts to calculate the proper size of the disgorgement judgment. It justifies that lightened evidentiary burden by pointing to the defendant's demonstrated status as a wrongdoer. The district court in this case agreed and awarded $34.9 million in disgorgement based on its conclusion that wrongdoers like Kokesh are not entitled to insist on normal evidentiary standards:

> When the Court is calculating the proper amount of disgorgement for violation of securities laws, it need not make "an exact calculation of the defendant's profits, but only a reasonable approximation of profits causally connected to the violation. Because such calculations are not capable of exactitude, any risk of uncertainty in calculating disgorgement *should fall on the wrongdoer whose illegal conduct created that uncertainty.*"

Pet. App. 44a (quoting *SEC v. Haligiannis*, 470 F.

Supp. 2d 373, 384 (S.D.N.Y. 2007)) (emphasis added). The district court stated that $34.9 million "*reasonably approximates* the ill-gotten gains causally connected to [Kokesh's] violations." *Id.* at 45a (emphasis added).

WLF does not dispute that it may be appropriate, in some circumstances, for courts to apply a relaxed evidentiary standard to SEC efforts to demonstrate the size of the sanction to be imposed on one found to have violated the securities laws. But a decision to apply a relaxed evidentiary standard because "any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose illegal conduct created that uncertainty" *penalizes* a defendant because of his wrongdoing.

Finally, WLF notes that both the Tenth Circuit and the district court recognized that one purpose of imposing a disgorgement remedy on securities-law violators is to deter others' violations of the securities laws. Pet. App. 11a, 43a. Deterrence is one of the principal reasons why governments impose penalties. For example, the Court has explained that punitive damages historically have been awarded as a "punishment" for the defendant "to prevent such offences in the future." *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (quoting *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791)). Imposing a disgorgement remedy in order to deter future misconduct and not solely for the purpose of restitution to those injured by the defendant's misconduct has all the hallmarks of a "penalty," as that term is commonly understood.

II. THE SEC'S EFFORT TO DISTINGUISH EQUITABLE SANCTIONS FROM PUNITIVE SANCTIONS IS UNAVAILING

The SEC has repeatedly argued that disgorgement is not a § 2462 "penalty" because it is properly categorized as an "equitable" remedy that lacks punitive intent. *See, e.g.* Opp. Cert. at 8. The Tenth Circuit cited the equitable-remedy argument in affirming the district court judgment. Pet. App. 10a. That reliance on equitable principles fails to demonstrate § 2462's inapplicability—both because it misreads legal history (the disgorgement sought by SEC has never been deemed an equitable remedy) and because it wrongly presumes that Congress would choose not to apply its § 2462 limitations period to an equitable remedy that is punitive in nature. Moreover, accepting SEC's equitable-remedy argument would eviscerate § 2462; it would permit SEC to seek a disgorgement remedy based on conduct that occurred decades in the past.

A. What SEC Now Terms "Disgorgement" Has Never Been Categorized as an Equitable Remedy by this Court

The SEC contends that "disgorgement is relief 'given in accordance with principles governing equity jurisdiction'" and that "its purpose is 'not to inflict punishment but to prevent unjust enrichment.'" Opp. Cert. at 8 (quoting *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 399 (1940)). It cites the following quotation from a later Court decision raising Seventh

Amendment right-to-jury-trial issues: "[W]e have characterized as equitable ... actions for disgorgement of improper profits." *Ibid* (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998)).

The SEC citations are misleading because those cases refer to a "disgorgement" remedy quite unlike the remedy sought by SEC in recent decades. The disgorgement remedy referenced by the Court is a form of restitution: in some instances, equity courts deemed it fair to order a defendant found to have infringed another's patent or copyright to disgorge the profits generated by his infringement and to pay them to the injured plaintiff, who was deemed the rightful owner of those profits. As explained above, the "disgorgement" sought by SEC in recent decades is of a far different nature. It seeks disgorgement from securities-law violators (to the Government, not to victims) because it deems it unjust to permit violators to be enriched by their wrongdoing. Thus, *Sheldon*'s statement that disgorgement is a remedy whose purpose "is not to inflict punishment" is irrelevant to this case because it was referring to a remedy far afield from the disgorgement remedy SEC now seeks.

Throughout American legal history, whether a remedy was classified as legal or equitable had particular significance in the fields of patent and copyright law. Before the merger of law and equity in the 20th century, patentees and copyright owners faced a difficult choice in deciding whether to proceed against infringers at law or in equity. If they were most interested in enjoining future infringement, they would proceed in equity because injunctive relief was

available only in equity, not in courts of law. But throughout most of the 19th century (until 1870 in the case of patents, 1909 in the case of copyrights), damages were unavailable in equitable actions filed against infringers; so a second lawsuit was required to recover damages for past infringement. *See Root v. Lake Shore and Michigan So. Ry. Co.*, 105 U.S. 189, 201 (1881)

Federal courts were sympathetic to this dilemma and thus permitted plaintiffs proceeding in equity to seek "equitable" monetary remedies (referred to as an "accounting") in addition to injunctive relief. The courts permitted patentees and copyright owners to recover in equity the net profit that the defendant earned as a result of his infringement, as a substitute for the damages they might have been awarded in an action at law. In an 1881 patent-law decision, this Court explained that once a federal court acquired jurisdiction to consider a grant of injunctive relief, it could "retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action." *Root*, 105 U.S. at 214. The Court elaborated:

> The rule adopted was that which the court in fact applies in cases of trustees who have committed breaches of trust by an unlawful use of trust property for their own advantage; that is, to require them to refund the amount of profit which they have actually realized. This rule was adopted, not for the purpose of acquiring jurisdiction, but, in cases where, having

> jurisdiction to grant equitable relief, the court was not permitted by the principles and practice in equity to award damages in the sense in which the law gives them, but a substitute for damages, for the purpose of preventing multiplicity of suits.

Id. at 214-15.

Both *Sheldon* and *Feltner*, the decisions on which SEC relies, were copyright cases. The "disgorgement" relief referenced in those decisions is the relief described in *Root*: a restitution award in equity to a patentee or copyright holder (consisting of the profits earned by the defendant as a result of his infringement) in lieu of the damages he might have recovered in an action at law.[6] That disgorgement

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[6] Nineteenth century courts recognized a rough equivalence between the equitable monetary remedy (disgorgement of the net profit earned by the defendant as a result of his infringement) and damages at law (awarded for losses suffered by the patentee or copyright holder as a result of the infringement). Indeed, in actions at law, this Court routinely recognized that the amount of the infringer's unjust profit could properly be used as evidence of the *plaintiff's* lost profits. *See, e.g., Suffolk Co. v. Hayden*, 70 U.S. 315, 320 (1865) ("And what evidence could be more appropriate and pertinent [in assessing damages] than that of the utility and advantage of invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or in other words, the losses to the patentee or owner

relief is far afield from the disgorgement SEC seeks, which would disgorge profits from a wrongdoer not for the purpose of compensating an injured plaintiff but for the purpose of ensuring that the defendant is not "unjustly enriched" by his wrongdoing. Historically, courts in equity did not recognize the relief SEC seeks.

The stark contrast between the equitable relief recognized by 19th-century equity courts and the disgorgement relief SEC seeks is all the greater given SEC's refusal to limit disgorgement to a wrongdoer's net profits. Nineteenth-century equity courts consistently refused to grant monetary relief that exceeded the infringer's net profits derived directly from the infringement, even when the plaintiff presented evidence that his losses far exceeded those net profits or that the defendant could have earned much more from his infringement if he had operated his business more efficiently. *See, e.g., Livingston v. Woodworth*, 56 U.S. 546, 560 (1854) (injured claimants are entitled to claim the defendant's net profits derived from the infringement, "that which ... is theirs, and nothing beyond this"); *Mowry v. Whitney*, 81 U.S. 620, 650 (1871).

B. Disgorgement Is Barred as a Section 2462 "Penalty" Even If It Could Properly Be Termed Equitable Relief

The SEC's equitable-remedy argument is unavailing for the additional reason that it fails to

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by the piracy instead of the purchase of the use of the invention.").

address the language of § 2462, which imposes a five-year limitations period on actions to enforce a "civil fine, penalty, or forfeiture." If the disgorgement relief sought by the SEC is a "penalty" within the meaning of that statute—and it is, for all the reasons cited above—it is irrelevant whether that relief was available historically from courts of equity.

Nothing in the language of § 2462 suggests that Congress was imposing a limit on remedies available in legal actions but not on equitable remedies. The SEC has cited no 19th-century case law in which the government sued in equity for injunctive relief and also sought "equitable" monetary relief, let alone an action of that sort in which the predecessor to § 2462 was deemed inapplicable. In sum, even if SEC's equitable-remedy argument were historically accurate, it would add nothing to the statutory-interpretation issue before the Court.

C. The SEC's "Equitable" Argument Would Eviscerate Section 2462

The SEC's interpretation of § 2462 should be rejected for the additional reason that it would virtually eliminate all limits on the Commission's power to reach back in time to prosecute long-ago alleged violations of the securities laws.

The statute of limitations would cease to exist if SEC could avoid § 2462 limitations any time it articulated an "equitable" rationale for imposing sanctions, and (as this case well illustrates) SEC has little difficulty concocting such rationales. In the years

since the Court decided *Gabelli*, SEC has come to rely increasingly on disgorgement claims to extract monetary payments from the regulated community, and many of those claims stretched back far more than five years. From 2011 to 2015, the annual monetary penalties collected by the SEC remained flat, while the annual disgorgement awards increased 60% during that same period, to more than $3 billion in 2015. The 2015 disgorgement awards were nearly double the 2015 penalty awards. *Compare* SEC, Select SEC and Market Data, Fiscal 2011 *with* SEC, Select SEC and Market Data, Fiscal 2015.

As *Gabelli* recognized, statutes of limitations are "vital to the welfare of society." 133 S. Ct. at 1221. They provide "security and stability to human affairs," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), without which society cannot function effectively. In adopting § 2462, Congress determined that, although enforcement of the securities law is an important societal goal, citizens should be permitted to arrange their affairs secure in the knowledge that securities transactions in which they engaged more than five years ago will not suddenly give rise to unanticipated civil fines, penalties, or forfeitures. That security will be all but eliminated if SEC prevails in this matter.

The SEC's efforts to thwart § 2462 are particularly worrisome because they create the danger of arbitrary enforcement. By lifting virtually all constraints regarding how far back SEC can reach to impose monetary sanctions, the Tenth Circuit has granted the Commission extraordinary discretion regarding whom to target and whether to seek to

bankrupt those targeted.[7] The SEC may attempt to assure the Court that it will use its new-found power responsibly. But as a D.C. Circuit panel recently responded to similar assurances from the Consumer Financial Protection Bureau, "'trust us' is ordinarily not good enough." *PHH Corp. v. CFPB*, 839 F.3d 1, 55 (D.C. Cir. 2016), *vacated and reh. granted*, ___ F.3d ___ (Feb. 16, 2017).[8]

In the context of punitive damages, the Court has identified the *unpredictability* of penalties as particularly worrisome and as calling into question the fairness of the legal system:

> [A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another. ... And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought

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[7] Lifting those constraints also grants SEC tremendous leverage to force settlements. Few SEC targets can afford to resist settlement pressures, even if they believe that SEC's charges are unwarranted, when the alternative is to go to trial and thereby risk incurring the huge "disgorgement" sanctions (covering transactions dating back decades) that SEC often seeks to assess.

[8] In rejecting CFPB's claim that no limitations period applied to Bureau enforcement proceedings, the panel stated, "This Court looks askance ... at the idea that the CFPB is free to pursue an administrative enforcement action for an indefinite period of time after the relevant conduct took place." *Ibid.*

> to threaten them with a fair probability of suffering in like degree when they wreak like damages.

Exxon Shipping, 554 U.S. at 502. Were it to grant SEC virtually unlimited authority to reach back in time, the Court would exacerbate the unpredictability problem—particularly in light of the tendency of some federal agencies to base their enforcement decisions on newly minted interpretations of existing federal law.

In sum, SEC's position—that imposing a monetary sanction equal to the funds misappropriated by the defendant is "equitable" and thus not subject to § 2462 limitations—should be rejected because it would eliminate virtually all temporal limits on SEC's authority and provide SEC with largely unfettered enforcement discretion.

III. THE COURT SHOULD INTERPRET SECTION 2462 WITHOUT REGARD TO ANY "NARROW CONSTRUCTION" PRESUMPTION

In interpreting § 2462, the Tenth Circuit may have been led astray by its inappropriate invocation of a "narrow construction" canon. It stated, "Statutes of limitations are to be interpreted narrowly in the government's favor," Pet. App. 6a, and then proceeded to construe § 2462 in the government's favor.

There is no evidence that Congress intended § 2462 to be read narrowly, and there is no basis for construing it in a manner other than in accord with the natural meaning of the statutory language.

While this Court has occasionally cited the "narrow construction" presumption, it has done so exclusively in cases in which some proprietary government interest was at stake. *See, e.g., BP America Production Co. v. Burton*, 549 U.S. 84, 95 (2006) (royalties for oil and gas production on federal land); *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386 (1984) (suit to recover unpaid federal income tax); *E. I. Du Pont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) (collection of unpaid shipping fees on government-operated railroad); *United States v. Whited & Wheless, Ltd.*, 246 U.S. 552, 561 (1918) (recovery of fraudulently procured government land). It has never been cited in a case in which the government was exercising its enforcement authority. For example, the Court did not cite it when construing § 2462 against SEC in *Gabelli*.

The Court's expressed rationale for the presumption indicates that it is inapplicable to enforcement actions. The Court explained in *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938) that "[t]he true reason [for the presumption] is to be found in the great public policy of preserving public rights, revenues, and property from injury and loss, by the negligence of public officers." That rationale could explain the application of the presumption when (as in the cases cited above) the Government's proprietary interests are at stake. But when, as here, SEC is not suing to "preserv[e] public rights, revenues, [or] property," when the Government is simply attempting to enforce the laws with respect to long-ago events, and when there is no question of "negligence of public officers," there is no reason to

construe § 2462 in a biased manner.

Moreover, it makes little sense to construe a statute of limitations in favor of the federal government when, as with § 2462, the only possible plaintiff is the federal government (or a private attorney general acting pursuant to a citizen-suit provision). In the great majority of the cases in which the Court has cited the narrow-construction presumption, the statute of limitations at issue applied to a wide array of potential plaintiffs; thus, it was at least plausible that Congress intended the statute to apply more narrowly when the United States was the plaintiff. But § 2462 *only* applies when the United States (or its surrogate) is filing suit. Under those circumstances, one would expect Congress, if it had intended the statute to apply narrowly, to include narrowing language in the statute and not to rely on courts to do the narrowing for it.

Finally, whatever force the narrow-construction maxim may have, it is more than counterbalanced by a maxim that runs in the opposite direction and is directly applicable to Government enforcement actions. *Gabelli* cited that maxim, as announced by Chief Justice John Marshall: "'It would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" 133 S. Ct. at 1223 (quoting *Adams v. Woods*, 6 U.S. at 342 (Marshall, C.J.)). The D.C. Circuit also cited *Adams* in a decision that expressly rejected application of the narrow-construction maxim and held (contrary to a position then espoused by SEC) that § 2462 imposed a five-year limitations period for administrative enforcement

actions filed by federal agencies:

> In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.

3M Co. v. Browner, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *Adams*, 6 U.S. at 341).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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